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SUPREME COURT, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-934

GERALD GORDON, as receiver of the rights and assets of Louis Porter,

Petitioner,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Introductory

This is an action involving a dispute between a liability insurance carrier and the receiver of the assets of its insured bottomed on a claim of bad faith on the part of the carrier in its dealings with the insured.

Statement

The relevant facts are set forth in the opinions delivered by the Court of Appeals of the State of New York consisting of a majority opinion written by Judge Bergan, a concurring opinion written by Chief Judge Fuld, and a minority opinion written by Judge Breitel. Accordingly, the facts need no further elaboration.

Since petitioner has not annexed a copy of the opinions to his petition, for the convenience of the Court we annex the opinions as an appendix hereto.

There is No Reason to Grant the Writ

The facts demonstrate that this case involves no more than a determination by the highest court of the State of New York that there was not sufficient evidence to support a finding of claimed bad faith on the part of a liability insurance carrier in its dealings with its insured.

The case is among the legion in which state appellate courts have set aside and vacated jury verdicts and dismissed actions on the ground that there was not adequate evidentiary basis to support the claim or the jury's verdict. It is the familiar rule that such determinations do not violate any constitutional rights and present no questions warranting review by this Court.

Petitioner's unhappiness at the result is not a sufficient predicate for certiorari. It is the time-honored rule that the purpose of granting certiorari is

> "[t]o bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." (*Magnum Co.* v. *Coty*, 262 U.S. 159, 163)

The rule is no different when the party is defeated in a state appellate court.

There is no basis for granting the writ and the petition should be denied.

Dated: New York, N.Y., January 12, 1973.

Respectfully submitted,

BENJAMIN H. SIFF,
Attorney for Respondent.

THOMAS R. NEWMAN,
Of Counsel.

APPENDIX

Opinions by the Court of Appeals of the State of New York

[30 NY 2d 427]

GERALD GORDON, as Receiver of the Rights and Assets of Louis Porter, Respondent-Appellant, *v.* NATIONWIDE MUTUAL INSURANCE COMPANY, Appellant-Respondent.

Argued February 9, 1972; decided June 1, 1972.

BERGAN, J. Recovery in this action on behalf of the insured Louis Porter by his receiver against the insurer Nationwide Mutual Insurance Company rests on a breach of good faith in the performance of its liability insurance contract by the company in managing the defense of liability claims against Porter.

The claimed breach of the implied obligation of the insurer to perform its contract of insurance in good faith rests on its refusal to settle negligence claims against Porter within the policy limits of $20,000.

The refusal, in turn, was based on the insurance company's assertion the policy had been canceled. Following on this assertion, the company withdrew from the defense of the negligence actions and refused to settle the claims within the policy limits. Porter ignored a notice of application by the plaintiffs in those actions to take inquests, served personally on him, and defaulted. The inquests, in turn, became the basis of Porter's receiver's present judgment against Nationwide. That judgment is for $259,058.87, over twelve-and-a-half times the policy limit.

Porter himself breached his contract to pay installments to Premier Credit Corporation which had financed on his behalf the premium for Nationwide's coverage, and it was this conceded breach of his premium financing contract,

and the notice of nonpayment received by Nationwide from Premier as Porter's agent, which led Nationwide to assert that the policy had been canceled and coverage terminated.

A "Notice of Cancellation", following Porter's failure to comply with his contract with Premier to pay for Nationwide's coverage, was sent by mail by Premier both to Nationwide and Porter. On locating this notice in its files Nationwide, which had undertaken the defense of the negligence actions, told attorneys for claimants against Porter that it regarded the policy as canceled and would not defend Porter or be responsible for resulting judgments.

It may be assumed for the purpose of this appeal that Nationwide was wrong as a matter of law in its assertion that Porter's uncontroverted default on his premium contract had effectively canceled the policy. But this does not make Nationwide liable for acting in bad faith.

More than an "arguable case" of coverage responsibility must be shown before liability may be imposed for breach of an implied covenant to act in good faith in denying coverage (*Sukup* v. *State of New York*, 19 N Y 2d 519). The holding in that case embraced a determination that the carrier was wrong as a matter of law in denying coverage, i.e., that there was coverage.

It was observed (p. 522): "The record in this case shows that the carrier was wrong and the insured right as to coverage, as the Workmen's Compensation Board found. The record does not show any gross disregard for its policy obligation by the insurer in asserting noncoverage. The record shows merely an arguable case in which the carrier was held wrong. That is not enough to impose a liability beyond the terms of the contract."

The notice of cancellation was mailed by the finance company to Porter November 10, 1961 with an effective date of cancellation stated to be November 23. This was not the 10 days' notice with 3 days added for mailing re-

quired by section 576 (subd. 1, par. [b]) of the Banking Law, governing cancellation by a "premium finance agency". Although it gave 13 days' notice, the day of mailing should have been excluded. The accident in which Porter was involved occurred November 28, 1961, well beyond 14 days after the mailing of the notice of cancellation to him on November 10.

The accuracy of the computation of days was debated between counsel at the trial of this present action, although appellant carrier does not argue on the merits in this court that the notice given to it and the insured by the finance agency technically met the time requirements of the Banking Law.

There is a large and very fundamental difference, however, on the effect of this one-day technicality in notice of cancellation flowing from Porter's breach of contract, between the legal effect of this purported cancellation of insurance and the asserted failure of Nationwide to act in good faith toward Porter when it refused to settle the case within the policy limits of $20,000.

If, as it now appears, Porter's finance company was a day short in the notice of cancellation it sent for Porter's breach of contract, the normal consequence would be that the policy remained in effect, uncanceled, and Nationwide continued liable for $20,000.

Indeed, Nationwide has been required in an earlier phase of this present action on behalf of judgment creditors in the negligence actions who were original coplaintiffs to pay its policy limits (58 Misc 2d 667, affd. 31 A D 2d 722) and that is not open in this appeal.

This was the holding in *Cannon* v. *Merchants Mut. Ins. Co.* (35 Misc 2d 625), the effect of which was debated between counsel for Nationwide and counsel for the plaintiffs in the actions against Porter. But a good faith belief in the cancellation of the policy would not only depend

on the view the insurer took of the legal question, but also its view of the facts of Porter's default in payment. In *Johnson* v. *General Mut. Ins. Co.* (24 N Y 2d 42) not only was the notice of cancellation not sufficient in time, but in fact the insured had not defaulted in payment (p. 47).

Therefore, the question of breach by Nationwide of its good-faith obligation to perform its contract of coverage cannot be walled off from the actualities in the chain of events which Porter set in motion by failure to perform his contract with his finance company to pay the premium.

And Nationwide's bad faith must be shown to be so great as to require it, not only to pay the policy limits, but to pay the essentially punitive sum of $250,000.

No such remarkable showing of bad faith is made in this record to warrant submission of the case to a jury for imposition of liability vastly beyond the policy limits on any theory—either breach of contract or negligence.

Nationwide's counsel advised it that the policy had properly been canceled for Porter's breach. Counsel testified on the trial, not only that this had been his professional opinion when advising the company, but that it continued to be his opinion at the trial of the present action.

Counsel for the plaintiffs in the negligence actions against Porter argued with the insurer's counsel that the law was the other way—i.e., the notice of default given by the finance company was a day short and cited *Cannon* v. *Merchants Mut. Ins. Co.* (35 Misc 2d 625, *supra*). The insurer's counsel replied he believed that case wrongly decided, and that the policy had properly been canceled well before the accident had occurred.

It would be an extraordinary result to hold a client guilty of breach of good faith, with large punitive damages, because it acts on advice of counsel—even mistaken advice—about the precedential stature of a single case in the Miscellaneous Reports. It would be even more extraordinary

if liability could be imposed on a client for breach of good faith in following counsel's advice because an adversary lawyer disagrees with the legal merits of the advice given. And the acerbity of the argument has itself no legal consequence.

When the actual documents governing the relations between Porter, his finance company Premier, and Nationwide, are examined, it is to be observed that Premier was vested by Porter with a very large measure of control over the continuance of Nationwide's policy. Porter assigned to Premier "all rights" that he had under the policy, and in case of default in installment payments, Premier was appointed Porter's agent to "request cancellation". This was a normal and reasonable consequence since Premier was assuming financial arrangements for the premium.

The indorsement in the policy, binding on Porter, "specifically directs" Nationwide to honor any request for cancellation made by Premier "just as though such requests were in fact made" by Porter. The indorsement also provided that "if the Company [Nationwide] cancels the policy it will be with advance notice to the Policyholder and the Lender".

It seems obvious this kind of direct cancellation by the insurer itself requiring notice to both Porter and Premier is not the kind of cancellation requested by the finance company on Porter's behalf as Porter's agent for a failure to pay finance installments. This distinction is to be seen in the statute governing the right of a "premium finance agency" to cancel an insurance contract by giving notice (Banking Law, § 576, subd. 1, pars. [a] & [b]).

The "Notice of Cancellation" sent by Premier on November 10, 1961 was mailed both to Porter and Nationwide and, reciting that Porter was in default, it could scarcely be treated by the insurer as other than election by Porter's agent to request cancellation. All this has a bearing on

the good faith of the carrier in accepting its counsel's view it was not on the risk when the accident of November 28, 1961 occurred.

Furthermore, and significant on the issue of good faith of Nationwide, it was Premier's error of one day in computing the time of the notice of cancellation for Porter's conceded default, and not Nationwide's, that fell short of the statutory requirement—a requirement which the statute placed directly on Premier. Nationwide failed to take note of the shortage of time in Premier's notice to it and of the fact that Premier had mailed the notice to Porter rather than served it personally. If served personally it would have been timely (Banking Law, § 576, subd. 1, par. [a]).

This was the error of Premier in following the statute and not of Nationwide which, like Porter, was on the receiving end of Premier's notice. It would be a harsh result indeed to impose the punitive consequence of a $250,000 judgment on Nationwide for this.

Certainly no harm was done to anyone—Porter or the claimants against him—by Nationwide's initial undertaking of the defense of the negligence actions before it discovered the notice of cancellation in its files. Nationwide had during this period received an offer of settlement of the actions within the policy limits which it did not accept, but it had Porter's report of the accident disclaiming responsibility and bad faith may not possibly be inferred from its failure to settle for the extent of its coverage at that early and indecisive stage of the litigation.

Nor had Porter made a request at any time to Nationwide that the claims against him be settled within the policy limits. Such a request, or an expressed desire by an insured that the insurer exhaust the limits of coverage, is a significant factor in some of the cases where the insurer's liability has been permitted to exceed the amount of coverage.

Its decision to withdraw from the defense of the negligence actions and its refusal to settle within the policy limits after that decision are both dependent on the assertion the policy had been canceled and both decisions are interrelated. It was on the basis of these decisions, charged by Porter's receiver to have been made in bad faith, that the judgment of $250,000 has been entered against Nationwide. No bad faith in justification of that judgment is established under this record.

The theory of Porter's receiver's claim of damages is that the large judgments resulting from the inquests have had some actual adverse economic or personal effect on Porter. It is alleged in the complaint that Porter was "damaged" by the judgments to the extent that the receiver of his "rights and assets" may recover the inquest-determined amounts on his behalf; that Porter "became indebted" to the negligence claimants and that the receiver is entitled to recover "on behalf of Louis Porter", and in this court the receiver's brief describes the receiver's action as "Porter's claim asserted for Porter".

It would not be easy to demonstrate greater indifference to the judgments or other consequences of his negligent driving than that displayed by Porter in this case. From the moment Nationwide advised him that because of his conceded breach of his finance contract for the premium, it would withdraw from the defense of the case, Porter showed no interest whatever in the consequences to him or to anyone else.

This complete indifference to the obligations under his contract, or to the claims based on his negligence, distinguished the case sharply from those decisions in which policy limits have been exceeded because of the bad faith of an insurer in managing the defense of claims. Porter's situation is thus similar to that considered in *Fidelity & Cas. Co.* v. *Gault* (196 F. 2d 329 [5th Cir.]).

Both Nationwide and the attorneys who had been retained by it to appear for Porter advised him by letters, November 19, 1963, that since his policy had been canceled November 23, 1961, before the accident, they would withdraw from the defense of his action and that he should retain other lawyers, a procedure which the lawyers retained by Nationwide told him they would facilitate. Porter ignored this notice.

He defaulted, both on an application to the court by his attorneys to withdraw from the case, and on an application by the attorneys for the plaintiffs in the negligence cases against him to take inquests. Service of both of these notices was made personally on Porter by direction of the court. He showed no concern about either motion.

It is against this background of utter indifference to his contractual obligations under the insurance contract that the "bad faith" of Nationwide in performance of its part of the contract with Porter must be measured.

A party indifferent to his contractual obligations arising from a liability insurance policy—in "Porter's claim asserted for Porter"—has succeeded in imposing a heavy punitive judgment on the other party to the contract for not performing it in good faith.

The rules governing the measure of damage chargeable to a liability insurer on failure, in violation of its contract, to defend the insured or to settle a claim within policy limits, are rather well established and understood in the profession. There is essentially no difference of view within the court as to what the rules are.

For a breach of the obligation to defend, the measure of damage is the cost of defense to the insured and the amount of recovery, if any, against the insured within the policy limits.

For a breach of contract based only on a failure to make reasonable settlement of a claim within the policy limits,

damages are measured by the policy limits. For a breach of implied conditions of the contract to act in its performance in good faith in refusing to settle within the policy limits, the damages may exceed the policy limits.

The punitive nature of damage for the bad faith breach of contract is a characteristic of the law of contracts generally, and is not a peculiarity alone of the contract of liability insurance. In every contract "there exists an implied covenant of good faith and fair dealing" (*Kirke La Shelle Co.* v. *Armstrong Co.* (263 N. Y. 79, 87).

The general application of the rule in New York is illustrated in *Van Valkenburgh, Nooger & Neville* v. *Hayden Pub. Co.* (30 N Y 2d 34); *Underhill* v. *Schenck* (238 N. Y. 7), and *Wilson* v. *Mechanical Orguinette Co.* (170 N. Y. 542).

But a punitive measure of damages is not applied routinely for breach of contract; and bad faith requires an extraordinary showing of a disingenuous or dishonest failure to carry out a contract.

An illustration of a refusal of the court to accept bad faith as a ground to disregard the usual rule of damage flowing from a breach is *Van Valkenburgh* (30 N Y 2d 34, *supra*) where, in an arguable case of defendant's acting in self-interest, the damages were limited to those flowing directly from a breach of a condition of the agreement and not allowed to exceed that measure.

No authoritative case in New York has ever allowed recovery against an insurer beyond the policy limits where the insured had in fact failed to make payment under a premium financing contract and the insurer's bad faith was a mistaken belief the policy had lawfully been canceled for this reason. The decision in *Johnson* v. *General Mut. Ins. Co.* (24 N Y 2d 42, *supra*), where the insured was actually not in default in premium payment and the policy had been wrongfully canceled, is a good illustration of the rule.

Appendix.

In *Brassil* v. *Maryland Cas. Co.* (210 N. Y. 235) there was an undisputed policy of coverage, a refusal to settle within its limits, a judgment in the negligence claim which exceeded the policy, a refusal by the insurer to appeal and a successful appeal prosecuted by the insured. The issue before the court was the insurer's obligation to pay the reasonable expenses of appeal, an obligation which was found in the absence of good faith of the insurer (p. 242). The absence of good faith there bears no relevancy to the present case.

In *New York Cons. R. R. Co.* v. *Massachusetts Bonding & Ins. Co.* (193 App. Div. 438, affd. 233 N. Y. 547) coverage was not in dispute. The insurer concededly managed the trial of the insured's case in its own interest in such a manner as, in bad faith, to deprive the assured of a right of subrogation (193 App. Div., p. 444). This case also has no relevancy to the present case.

And in *McAleenan* v. *Massachusetts Bonding & Ins. Co.* (232 N. Y. 199) the failure of defendant to move for nonsuit and the unanimous affirmance by the Appellate Division were held to preclude this court from examining the issue of damage.

Nor do the cases in other jurisdictions based on bad faith refusal to settle and permitting policy limits to be exceeded give greater support to plaintiff's claim here than the New York decisions. It is fair to say as to those cases, too, none has gone as far as the present case in allowing damage to an insured whose act of default became the basis of the insurer's assertion of noncoverage.

A good illustration of this distinction is in *American Fid. Fire Ins. Co.* v. *Johnson* (177 So. 2d 679 [Fla.]) where, as in *Johnson* v. *General Mut. Ins. Co.* (24 N Y 2d 42, *supra*) in New York, the premium for renewal of policy had actually been paid but through mishandling by a broker under an arrangement made by the insurer's agent,

the insurer treated the policy as canceled. A refusal to settle was there treated as a breach of good faith and the policy limit was penetrated.

A similar problem was considered in *Blakely* v. *American Employers' Ins. Co.* (424 F. 2d 728 [5th Cir.]). There, although the premium had actually been paid, an agent of the company received a notice that it was canceled for nonpayment. The company's denial of coverage was deemed wrongful and damage was permitted beyond the policy limits.

In *Landie* v. *Century Ind. Co.* (390 S. W. 2d 558 [Mo.]) the policy concededly covered plaintiffs who had not themselves contributed to the coverage problem and the issue of good faith on the refusal to settle was held to be an open fact question. In *Bowers* v. *Camden Fire Ins. Assn.* (51 N. J. 62) there was conceded coverage and a "selfish" refusal by the insurer in its own interests to settle.

In *Western Cas. & Sur. Co.* v. *Herman* (405 F. 2d 121 [8th Cir.]) the court treated the stipulation between the parties as having "conclusively established" the insurer's lack of good faith (p. 123). And in *Liberty Mut. Ins. Co.* v. *Davis* (412 F. 2d 475 [5th Cir.]) the insurer's refusal to settle in a case of conceded coverage was based on its own self-interest—a fear of a risk to itself of liability in other actions. This was regarded as a breach of good faith.

Finally, in *Comunale* v. *Traders & Gen. Ins. Co.* (50 Cal. 2d 654) the court accepted without differential analysis, as a predicate for its decision, the "wrongful refusal" of the insurer to settle a claim. These cases are all distinguishable from the present case.

Where there is a breach of the terms of a contract of insurance, not found to have been made in bad faith, the damage for refusal to settle is limited, both in New York and elsewhere, by the policy coverage or, additionally, to that and the cost of defense where there is also a refusal

to defend (*Grand Union Co.* v. *General Acc., Fire & Life Assur. Corp.*, 279 N.Y. 638; *Best Bldg. Co.* v. *Employers' Liab. Assur. Corp.*, 247 N.Y. 451; *Seward* v. *State Farm Mut. Auto Ins. Co.*, 392 F. 2d 723 [5th Cir.]; *Hendry* v. *Grange Mut. Cas. Co.*, 372 F. 2d 222 [5th Cir.]; *Myers* v. *Farm Bur. Mut. Ins. Co.*, 14 Mich. App. 277).

The order should be reversed and the complaint dismissed, with costs.

Chief Judge FULD (concurring). I agree with Judge BERGAN that the record before us is devoid of any evidence that defendant Nationwide acted in bad faith and, consequently, I too am for reversal and dismissal of the complaint. However, even were we to assume the existence of bad faith on the insurer's part in refusing to settle within policy limits, I would still favor dismissal of the complaint on the ground that there was no showing that the insured, on whose behalf the plaintiff receiver is suing, suffered any actual damage.

There are, as noted in the dissenting opinion (pp. 448, 449), decisions in some jurisdictions which hold that an excess judgment entered against the insured measures the damages suffered by him even though he may be insolvent and the judgment uncollectible. I find such a rule both unreasonable and unfair. Recovery against an insurer should not be sanctioned or upheld as punishment or as a punitive measure. In my view, an insured is not harmed and, by that token, suffers no damage when an uncollectible judgment is entered against him. (Cf., e.g., *Bourget* v. *Government Employees Ins. Co.*, 456 F. 2d 282; *Harris* v. *Standard Acc. & Ins. Co.*, 297 F. 2d 627, 631-632, cert. den. 369 U. S. 843.) As the United States Court of Appeals for the Second Circuit wrote in *Harris* (297 F. 2d, at pp. 631-632),

> "The law of New York requires proof of actual loss to support recovery for a tort of this type. The pur-

pose of tort damages is to compensate an injured person for a loss suffered and only for that. The law attempts to put the plaintiff in a position as nearly as possible equivalent to his position before the tort. Recovery is permitted not in order to penalize the tortfeasor, but only to give damages 'precisely commensurate with the injury.' [*Gressman* v. *Morning Journal Assoc.*, 197 N. Y. 474, 480.]"

And, just a few months ago, that same court, relying upon its decision in *Harris*, declared (per FRIENDLY, C. J.) that "what gives rise to the [insurer's] duty and measures its extent is the conflict between the insurer's interest to pay less than the policy limits and the insured's interest not to suffer liability for any judgment exceeding them. In the rare instance where the insured has no such interest, there can be no conflict and the duty does not arise." (*Bourget* v. *Government Employees Ins. Co.*, 456 F. 2d, at p. 285.)

In the case before us, it is clear beyond peradventure that the insured, in light of his financial standing and economic condition, could not have had either the interest or the motivation to prevent entry of a judgment in excess of policy limits. So far as appears, the insured's only asset was his eight-year-old automobile which had been involved in the accident. He had been a gas station attendant, living in a basement apartment in a low rent area and, quite obviously, had no real credit standing in the community which could have been impaired or affected by the existence of a judgment against him. In point of fact, for all that appears, he may not even be alive; it is acknowledged that he has disappeared and that his whereabouts are completely unknown. The suggestion that he may come into an inheritance or that he may embark on a successful business career ignores reality.

I do not suggest—although there are a number of decisions so holding—that an insured must pay the judgment before he, or another on his behalf, is able to proceed against a bad faith insurer. However, there must be some showing that he has been damaged. In the case before us, there is not the slightest evidence, or even intimation, that the insured was harmed by the judgment, that he had any assets which were imperiled or that either his reputation or credit was impaired.

In short, the complaint in this case should be dismissed not only because there is no evidence that the insurer acted in bad faith but also because there is no proof that the insured suffered any damage.

Breitel, J. (dissenting). In an action by the receiver of an insured against his automobile liability carrier for negligence and breach of contract in refusing to defend or settle wrongful death and personal injury claims within policy limits, there are cross appeals. The receiver recovered, after a jury trial, compensatory damages of $201,129.17, equal to the excess judgments awarded in prior tort actions against the insured. Upon motion to the trial court an award of punitive damages in the additional amount of $300,000 was set aside. The Appellate Division, by a divided court, affirmed. The dissenters did not disagree with the findings of the carrier's bad faith, but disagreed as to the measure of damages. The significant issues turn on the proper measure of damages, and alleged errors on requests to charge.

Plaintiff receiver had been appointed in supplementary proceedings to enforce the excess judgments recovered against the insured Porter, a former garage mechanic who apparently became unlocatable during the litigation. The receiver, in effect the judgment creditors, based his claims on the carrier's breaches of duty towards its insured.

Appendix.

There should be a reversal and direction for a new trial. The court should not have charged that if liability is found the damages are measured as a matter of law by the amount of the excess judgments. Given the economic condition of the insured the damages should have been realistically assessed by the jury under instructions setting forth the factors governing the damage sustained by the insured from the excess judgments rendered against him.

In August, 1961 Louis Porter, the insured, financed the annual renewal of his Nationwide automobile liability policy through the Premier Credit Corporation. On November 28, 1961 Porter's 1953 sedan collided with the rear of a vehicle occupied by Mr. and Mrs. Rotsettis and a passenger, Michael Panteloglu. The Rotsettises died as a result of the accident and the passenger was severely injured. Porter, some six days later, notified Nationwide and attributed the rear-end collision to Mr. Rotsettis, the driver of the impacted car. He also advised Nationwide that he had included the name of a witness to the accident in his report to the State Department of Motor Vehicles.

In December, 1961, Leon Greenspan, a lawyer representing the Rotsettises' estates, wrote a claim letter to Porter who forwarded it to Nationwide. From December, 1961 to July, 1962 Mr. Greenspan made several proposals to settle all claims, including the Panteloglu claim, within the policy limits of $20,000. When no offer resulted, the estates sued Porter in July, 1962. He forwarded the papers to Nationwide. (Panteloglu sued about two years later.) After some delay and prodding by Mr. Greenspan Nationwide served an answer and demand for a bill of particulars in September, 1962. Again, Mr. Greenspan offered to settle for the policy limits. Nothing happened.

In November, 1962, 11 months after notice of the accident, Nationwide notified Porter and claimants' lawyer that it was disclaiming because Porter's finance company had

sent a notice of cancellation dated and served November 10, 1961, prior to the accident. The precipitating cause was Nationwide's belated discovery in Porter's file of a policy endorsement of finance premium and a purported notice of cancellation by the finance company. The endorsement empowered Nationwide to honor "requests for cancellation" tendered by the finance company. The endorsement continued: "If the Company cancels the policy it will be with advance notice to the Policyholder". The notice of cancellation had been sent to Porter by the finance company, not Nationwide. Notably, the endorsement did not authorize the finance company to cancel but only to request cancellation, nor did the notice comply with the statutory 13-day advance notice requirements (Banking Law, § 576, subd. 1, par. [b]; *Johnson* v. *General Mut. Ins. Co.*, 24 N Y 2d 42, 48).

Claimants' lawyer brought his objections to Nationwide's attention, even citing a recent case (*Cannon* v. *Merchants Mut. Ins. Co.*, 35 Misc 2d 625) directly in point as to the timeliness of the notice of cancellation. Nevertheless, Nationwide evidently never inspected the premium finance agreement nor investigated the basis for cancellation by the finance company. Indeed, the finance agreement, the only document ever signed by Porter, was not located by Nationwide until four years later. With respect to the timeliness of the notice, Nationwide's lawyer admitted to claimants' lawyer that the facts in the case, *Cannon* (35 Misc 2d 625, *supra*), were substantially identical but he disagreed with the holding. He also admitted on the trial that he had offered no contrary authorities. Finally, claimants' lawyer asked Nationwide to bring a declaratory judgment action to resolve the matter, agreeing to withhold the claims until the issue was decided. Nationwide's lawyer dismissed the suggestion.

Eventually, in December, 1962, Nationwide moved to withdraw from the case and the estates applied for in-

quests. Its lawyer reportedly agreed that if the estates would not oppose withdrawal, Nationwide would withdraw its answer and not object to inquests, stating: "We don't care what you do to our insured."

The inquests followed and default judgments were entered against Porter on the Rotsettises' claims for $179,462.50 and in a parallel litigation on the Panteloglu claim for $35,000. Notwithstanding the magnitude of the Rotsettis judgments, Nationwide refused to consider claimants' repeated proposal to settle all claims against Porter within policy limits. In an action severed from the present one the Rotsettis claimants, in their own right under section 167 of the Insurance Law, recovered the policy limits from Nationwide (*Rotsettis* v. *Nationwide Ins. Co.*, 58 Misc 2d 667). The conclusion in that action that the cancellation by the finance company was unauthorized and without proper notice was affirmed on appeal (31 A D 2d 722, mot. for lv. to app. den. 23 N Y 2d 646). As noted earlier, the present action was brought by a court-appointed receiver in supplementary proceedings to enforce the Rotsettis judgments against Porter, claiming on causes of action in his favor against Nationwide (see McKinney's Cons. Laws of N. Y., Book 7B [1971 Cum. Sup.], Supplementary Practice Commentary by Professor David D. Siegel to CPLR 5201, p. 17, and CPLR 5228, p. 118; *Matter of Kreloff* v. *Mendez*, 65 Misc 2d 692, also involving an action by a receiver in supplementary proceedings and a refusal to defend or settle by Nationwide).

On the trial, to establish negligence and bad faith in Nationwide's persistent refusal to defend or settle, witnesses called by plaintiff described the practice in the insurance industry. Gavin and Gochman each testified that it was industry practice to seek a declaratory judgment when a tort action is pending and a question of policy cancellation arises. Gochman stated that when disclaimer is based on cancellation it is customery to check the file for

the notice of cancellation, and examine it for timeliness. Invariably when doubt as to cancellation arose, outside counsel would be retained to sue for a declaratory judgment. Even defendant's expert, Carroll, when informed upon cross-examination that notice had not been sent by Nationwide and a valid cancellation disputed, conceded that in a case as serious as this no carrier would abandon its insured.

The court charged the jury that they could find for the plaintiff if the insurer negligently or in bad faith abandoned the defense and refused at all times to consider a continuing opportunity to settle within policy limits ($20,000). As a matter of law damages were fixed by the court as the amount of the judgments in the personal injury and wrongful death cases, with credit for $13,333.33 paid in the section 167 action. The court refused to charge on contributory negligence, or to leave the assessment of damages to the jury. The jury returned a special verdict in favor of plaintiff receiver finding negligence and bad faith by the insurer and an award equal to the excess judgments. The jury's award also included punitive damages for $300,000, which, as stated earlier, was stricken by the trial court on motion.

The insured's contract claim is posited both upon a breach of the express covenant to defend and the implied covenant of good faith not to impair the insured's interests. The doctrine that a liability insurer owes a duty of good faith to protect its insured, including the good faith consideration of opportunities to settle, because of its exclusive control in the management of claims has deep roots in New York (e.g., *Best Bldg. Co.* v. *Employers' Liab. Assur. Corp.*, 247 N. Y. 451, 453; *Brassil* v. *Maryland Cas. Co.*, 210 N. Y. 235, 242; *New York Cons. R. R. Co.* v. *Massachusetts Bonding & Ins. Co.*, 193 App. Div. 438, 444, affd. 233 N. Y. 547; *Brunswick Realty Co.* v. *Frankfort*

Ins. Co., 99 Misc. 639, 642*; see Note, Recent Developments in the Excess Judgment Suit, 36 Brooklyn L. Rev. 464; Note, Excess Judgments and the Bad Faith Rule, 36 Albany L. Rev. 698). Indeed, a recent amendment to section 40 of the Insurance Law imposes possible penalties upon insurers for "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear" (§ 40-d, as added by L. 1970, ch. 296, § 1).

Elsewhere it has been held that the insurer's duty attaches to all aspects of a claim from investigating it, through good faith consideration of opportunities to settle it, to prosecuting appeals (Ann., Insurer's Bad Defense—Liability, 34 ALR 3d 533; Ann., Liability Insurer—Refusal to Defend, 49 ALR 2d 694; Ann., Liability Insurer—Duty to Settle, 40 ALR 2d 168; Ann., Insurer's Withdrawal From Defense, 167 A. L. R. 243). Indeed, at least one jurisdiction would go further and with respect to the insurer's duty to settle would impose strict liability for refusal whether in good faith or not. The California Supreme Court, observing that it is the insured's justifiable expectation that the entire coverage be utilized to effect a settlement, would apparently hold the insurer strictly accountable for any excess judgment when, at the time of refusal, there was a possibility however slight that a verdict would exceed coverage (*Crisci* v. *Security Ins. Co.*, 66 Cal. 2d 425, 430-431; see, also *Marsango* v. *Auto-*

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* An interesting variation arises when the insurer defending an action brought by an assignee of insured contends that in good faith in refusing to settle the tort action is relied on insureds disclaimer of any responsibility for the accident. See *Pipoli* v. *United States Fid. & Guar. Co.* (38 A 2d 249) in which the court was sharply divided. The instant case, of course, involves an affirmed finding that there was bad faith in the refusal to defend and the effect of the refusal to settle, which alone might or might not have constituted bad faith.

mobile Club, 1 Cal. App. 3d 688; *Trahan* v. *Central Mut. Ins. Co.,* 219 So. 2d 187, 192-193 [C.A., La.]; *Herges* v. *Western Cas. & Sur. Co.,* 408 F. 2d 1157, 1161 [C.A., 8th]; Comment: Approaching Strict Liability of Insurer for Refusing to Settle Within Policy Limits, 47 Neb. L. Rev. 705; Comment: Insurer's Strict Liability for Entire Judgment, 13 S. Dak. L. Rev. 375).

Significantly, the authorities discussed thus far are concerned with the insurer who defends but in doing so advanced its own interests by compromising those of its insured. In this case, Nationwide compounded the wrong by completely removing itself from the case. It thus denied the insured not only his express contract right to a defense but also the implied right to have settlements considered in good faith. The wrong is the more egregious, bad faith having been found and the finding virtually compelled by the record. The consequences should not be less than when the insurer defends and wrongfully ignores opportunities to settle. The courts, whenever confronted with the issue, so hold.

True, the unjustified refusal to defend, even if in bad faith, will not cast an insurer in damages for an excess judgment in the absence of a wasted opportunity to settle. Thus, damages are generally then limited to the policy coverage, counsel fees, and other expenses of litigation (1 Long, Law of Liability Insurance, § 5.05D, p. 5-41; Ann., Liability Insurer—Refusal to Defend, 49 ALR 2d 694, § 10). When, however, as in this case, there is the persisting proposal to settle much larger claims within policy limits, the damage rule is not so narrow. Then almost all courts agree that the insurer's liability will extend to the excess judgment (e.g., *Western Cas. & Sur. Co.* v. *Herman,* 405 F. 2d 121 [C.A., 8th]; *Seward* v. *State Farm Mut. Auto. Ins. Co.,* 392 F. 2d 723 [C.A., 5th]; *Foundation Reserve Ins. Co.* v. *Kelly,* 388 F. 2d 528 [C.A.,

10th]; *Landie* v. *Century Ind. Co.*, 390 S. W. 2d 558 [C.A. Mo.]; *Comunale* v. *Traders & Gen. Ins. Co.*, 50 Cal. 2d 654; *Southern Farm Bur. Cas. Ins. Co.* v. *Logan*, 238 Miss. 580; *Myers* v. *Farm Bur. Mut. Ins. Co.*, 14 Mich. App. 277; *American Fid. Fire Ins. Co.* v. *Johnson*, 177 So. 2d 679 [C.A., Fla.]; *contra*, *Schurgast* v. *Schumann*, 156 Conn. 471, 489-491; *Mannheimer Bros.* v. *Kansas Cas. & Sur. Co.*, 149 Minn. 482, 485-487; see, generally, 1 Long, *op. cit.*, *supra*, pp. 5-42 to 5-44; Ann., Liability Insurer—Refusal to Defend, 49 ALR 2d 694, § 11).

In *Seward* v. *State Farm Mut. Auto. Ins. Co.* (392 F. 2d 723, *supra*) the insurer wrongfully refused to defend its insured in a wrongful death action. A default judgment was entered against the insured on the death claim for $57,000, an excess of $47,000 over policy limits. In the contract action by the insured against the insurer the issue was whether an insurer, failing to defend, is liable for the excess judgment in the absence of an opportunity to settle. The Federal Court of Appeals under constraint of the Florida cases reluctantly held that in addition to wrongful refusal to defend, an essential element was an opportunity to settle within policy limits. In the absence of a settlement proposal, under Florida law, the insurer could not be held liable for the excess judgment, because, the court said, "An offer to settle, even if unknown to the insurer, is objective evidence of the connection between the insurer's breach of contract and the amount of the damages" (392 F. 2d, at p. 727).

In *Comunale* v. *Traders & Gen. Ins. Co.* (50 Cal. 2d 654, *supra*) the insurer had refused to defend its insured or to accept settlement proposals within policy limits. A judgment, $15,000 in excess of coverage, was recovered against the insured on the tort claim. The tort judgment creditors took an assignment of the insured's cause of action against the insurer. The Supreme Court of California, in holding the insurer liable, stated:

"It is generally held that since the insurer has reserved control over the litigation and settlement it is liable for the entire amount of a judgment against the insured, including any portion in excess of the policy limits, if in the exercise of such control it is guilty of bad faith in refusing a settlement [citations omitted]. [Here], Traders never assumed control over the defense. However, the reason Traders was not in control of the litigation is what is wrongfully refused to defend Sloan, and the breach of its express obligation to defend did not release it from its implied duty to consider Sloan's interest in the settlement." (*id.*, p. 660).

"An insurer who denies coverage does so at its own risk, and, although its position may not have been entirely groundless, if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract. Certainly an insurer who not only rejected a reasonable offer of settlement but also wrongfully refused to defend should be in no better position than if it had assumed the defense and then declined to settle. The insurer should not be permitted to profit by its own wrong." (*id.*, p. 660) (see, also, Ralston and Ballard, Insurer's Liability for Wrongful Refusal to Defend or Settle, 36 U. Mo. at K.C. L. Rev. 304).

In New York the consequences of an insurer's bad faith refusal to defend, with or without an opportunity to settle, has not arisen often. True, there are easily distinguished cases in which damages have been limited to attorney's fees and litigation expenses incurred by the insured (*e.g.*, *Brassil* v. *Maryland Cas. Co*, 210 N. Y. 235, *supra; Grand Union Co.* v. *General Acc., Fire & Life Assur. Corp.*, 279 N. Y. 638; *Goldberg* v. *Lumber Mut. Cas. Ins. Co.*, 297 N. Y. 148). But in every such case the insured had successfully defended the tort claim and no question of excess liability, therefore, arose. There were, in short, no excess tort judgments.

The rule regarding the insurer's liability for wasted opportunities to settle as a result of bad faith withdrawal from the defense should be followed. Certainly, in the instance of a solvent insured who has been denied the valuable right to have his insurer consider a strategic settlement within policy limits, the insurer should be held responsible for all the consequences of its conduct, and the measure of that loss orinarily would be the amount of the excess judgment, for exactly the reasons expressed by the California court (50 Cal. 2d 654, *supra*).

Nationwide does not quarrel with the general rule. Its position turns on the allegedly impecunious status of Porter, his alleged insolvency, and uncontradicted suggestions that he cannot be located. From these facts it urges that Porter sustained no harm from the excess judgments, and, therefore, his receiver should not recover damages automatically measured by the excess judgments.

Regardless of the insured's financial responsibility most courts automatically adopt the excess judgment as the measure of damages in the insured's contract action. In *Lee* v. *Nationwide Mut. Ins. Co.* (286 F. 2d 295 [C.A., 4th]) the court rejected the view that the mere existence of an outstanding judgment which may never be paid, is not legal injury. More acceptable, the court noted, "is the view treating the extant, unpaid judgments as injuries in themselves, their overburden measuring the pecuniary damages" (*id.*, at p. 298; accord, *Smoot* v. *State Farm Mut. Auto. Ins. Co.*, 299 F. 2d 525, 530 [C.A., 5th]; *Southern Farm Bur. Cas. Ins. Co.* v. *Mitchell*, 312 F. 2d 485 [C.A., 8th]; *Schwartz* v. *Norwich Union Ind. Co.*, 212 Wis. 593, 595; *Henke* v. *Iowa Home Mut. Cas. Co.*, 250 Iowa 1123, 1141-1144; *Sweeten* v. *National Mut. Ins. Co.*, 233 Md. 52, 56-57). That the insured was judgment proof or discharged in bankruptcy has been held not to affect recovery for the excess judgment (*Southern Fire & Cas. Co.* v. *Norris*, 35

Tenn. App. 657, 671-673; *Young* v. *American Cas. Co.*, 416 F. 2d 906, 911-912 [C.A., 2d]; *Robertson* v. *Hartford Acc. & Ind. Co.*, 333 F. Supp. 739; *Brown* v. *Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 689-693). In the *Brown* case the court noted than an insurer should not be able to use the limited financial responsibility of an insured to escape obligation, and that the excess judgment should set out the measure of damages (at pp. 690-691). The reasons for such a rule were best expressed in *Gray* v. *Nationwide Mut. Ins. Co.* (422 Pa. 500). To permit otherwise, the court observed, would allow insurers to benefit from the impecuniousness of an insured, encourage insurers to be less responsive to their contractual obligations, and overlook the basic economic fact that while the judgment remains outstanding the insured suffers "real damage" (*id.*, at pp. 505-506; accord, *Ammerman* v. *Farmers Ins. Exch.*, 22 Utah 2d 187, 189).

A few jurisdictions, some in distinguishable circumstances, have held that an insured is not injured and consequently suffers no damage by an uncollectible excess judgment (e.g., *Dumas* v. *Hartford Acc. & Ind. Co.*, 92 N. H. 140, 141; see 1 Long. *op. cit., supra*, § 5.22). Recently the court in *Bourget* v. *Government Employees Ins. Co.* (456 F. 2d 282 [C.A., 2d, per FRIENDLY, C. J.]) concluded that the estate of a deceased insured, insolvent at the time an excess judgment was entered, may not recover against the insurer for bad faith refusal to settle. The decision followed *Harris* v. *Standard Acc. & Ins. Co.* (297 F. 2d 627 [C.A., 2d], per LUMBARD, C. J., cert. den. 369 U. S. 843) involving an action by a trustee in bankruptcy of an insured insolvent at the time the excess judgment was recovered. The rule of these cases is evidently limited to insureds, dead and leaving no assets, or discharged in bankruptcy and insolvent at the time the excess judgment was rendered (see *Young* v. *American Cas. Co.*, 416 F. 2d 906 [C.A., 2d], *supra*, involving a bankrupt, solvent at the time the excess judgment was recovered).

Appendix.

The situation of the insolvent, the deceased, or the bankrupt insured presents an obvious difficulty, in contrast to the solvent insured. In many instances, measuring the damages by the amount of the excess judgments, especially when they are as great as in this case, incurs judicial resistance, even as against a carrier which has been proven to be grossly negligent and callously arrogant. Nevertheless, limiting damages to policy coverage and litigation expense, if any, incurred by an abandoned insured would be patently unjust. In most instances, if that were the rule, the carrier will not have risked more by its faithless conduct than it would have lost if it had performed its obligations faithfully. Moreover, it rewards the carrier for an irresponsible gamble, just because the insured is insolvent, dead, or bankrupt, a gamble that will often pay off, despite a breach of its duty to the insured and despite its indirect duty to the injured (see Insurance Law, § 167).

In the case of the insolvent, and in some instances, the deceased insured, there is no wholly satisfactory way to assess the economic harm wrought by the faithless carrier. This follows from the circumstance that as each increment of damage is paid, it becomes subject to the tort creditor's claim, with an excess, albeit reduced, judgment liability still outstanding. The sequential effect is not ended until the excess judgment is wholly discharged. Nevertheless, in extreme cases, and this is such a one, the magnitude of the excess judgment may be so great as to make unjust liability up to its full amount. As a matter of probabilities there may be little or no chance that the insured could ever be vulnerable to a judgment of such size. As for bankruptcy, the submission to bankruptcy to avoid the excess judgment may be a significant loss for those who are sensitive or for those who have a reasonable likelihood of ever requiring credit. Nevertheless, at least in

the instance of judgments of great magnitude, there may be no realistic escape from bankruptcy.

The discussion thus far begins to elicit the economic factors which should influence the measure of damages. The factors would include the age, economic status, economic prospects, skills, health, and any other matters presently existing which would be reasonably predictive of the insured's economic future, or that of his estate, if it were likely to receive assets or benefactions. The task is not easy, but it is not unusual (e.g., *Duane Jones Co.* v. *Burke*, 306 N. Y. 172, 192; *MacGregor* v. *Watts*, 254 App. Div. 904. These cases illustratively involved difficult projections of economic harm). A similar assessment is required when persons have been permanently injured or have been killed and the damage to their prospects or to their dependents is to be assessed (e.g., *Houghkirk* v. *Delaware & Hudson Canal Co.*, 92 N. Y. 219, 223-225; *Grayson* v. *Irvmar Realty Corp.*, 7 A D 2d 436; *Dimitroff* v. *State of New York*, 171 Misc. 635, 637-639; 13 N. Y. Jur., Damages, §§ 16 [at p. 441], 82-84).

Difficult or easy, such a rational and considered assessment is both fair and pragmatic. It is not as unfair as the imposition, automatically, of liability for the full amount of the excess judgment, even if it were a $1,000,000 judgment against an aged insured living on government beneficence, and suffering from a terminal illness. Nor is it as unfair as limiting recovery to the policy limits and litigation expense, if any, to a young person, impecunious in capital assets, but in the verge of embarking upon a professional or business career, to whom an overhanging judgment or bankruptcy might be an economic disaster.

Consequently, the better rule, in cases involving other than a solvent insured, would be for a trial court to instruct a jury with respect to the applicable factors, some of which have been suggested, bearing on the pecuniary and

tangible harm done to the insured and assess that harm to include the economic harm to the insured now and in the reasonably anticipated future, of the overhanging excess judgment. Included, too, would be any other tangible harms, such as the loss of the right to operate motor vehicles or to obtain employment or insurance.

A further comment is suggested. The fact that this action is by the receiver in supplementary proceedings and that he is the alter ego for the tort judgment creditors is of no moment. Judgment creditors may always reach the debtor's assets. There is no reason why they may not reach an asset, the instant causes of action, just because they arose out of the transaction in which they were injured. It is perverse to urge that they may not. Moreover, ultimate compensation to the claimants is also the mechanism for removing or alleviating what the court in *Lee* v. *Nationwide Mut. Ins. Co.* (286 F. 2d 295, 298, *supra*) described as the "overburden" sustained by the insured. Lastly, to reject recovery because behind the receiver stand the claimants as the real beneficiaries is to do violence to the statutes and principles extending remedies to judgment creditors, even tort judgment creditors.

Of course, the insured or his representative has the burden of persuasion on damages. He satisfies the burden, prima facie, by proving the amount of the excess tort judgment. The insurer may always show that in fact the insured was invulnerable or immune to the judgment, in whole or in part, because of his economic circumstances, or bankruptcy. The insured or his representative may then controvert the insurer's evidence.

There are other issues, namely, alleged errors on requested charges by Nationwide regarding the defense of failure to mitigate damages and the insured's contributory negligence.

Nationwide never pleaded by way of affirmative defense that Porter by not employing independent counsel to de-

fend the wrongful death and personal injury actions failed to mitigate damages (CPLR 3018; subd. [b]; cf. *McClelland* v. *Climax Housing Mills,* 252 N. Y. 347, 352-353; *Livant* v. *Livant,* 18 A D 2d 383, 384-385; 3 Weinstein-Korn-Miller N. Y. Civ. Prac., ¶¶ 3018-15 to 3018-18; Ann., Pleading—Tort—Mitigation of Damages, 75 ALR 2d 473, 479; 13 N. Y. Jur., Damages, § 26). Moreover, there is some doubt whether there is any duty, qualified or absolute, upon an insured to employ counsel after the insurer has wrongfully withdrawn (see *Carthage Stone Co.* v. *Travelers Ins.,* 274 Mo. 537; *In Re International Reinsurance Corp.,* 29 Del. Ch. 34, 78-79; cf. *Seward* v. *State Farm Mut. Auto. Ins. Co.,* 392 F. 2d 723, 725, n. 4 [C.A., 5th], *supra; Evans* v. *Continental Cas. Co.,* 40 Wn. 2d 614, 628; *American Sur. Co.* v. *Sutherland,* 35 F. Supp. 353, 358; but see *Fidelity & Cas. Co. of N. Y.* v. *Gault,* 196 F. 2d 329 [C.A., 5th]; *Southern Farm Bur., Cas. Ins. Co.* v. *Logan,* 238 Miss. 580, *supra;* 1 Long, *op. cit., supra,* § 5.29.) In any event, Nationwide never carried its burden of showing that damages would in fact have been mitigated if counsel had been retained by Porter, whether in whole or in part, and that it would have been reasonable for a person in Porter's financial condition, as Nationwide contends it was, to have done so. In the absence both of pleading and proving mitigation, the refusal to charge was proper.

On the other hand, it was wrong to refuse to charge on contributory negligence limited to the negligence cause of action. Receipt of notice of the insurer's withdrawal and the claimants' motion for inquests, and the December statement placing some of the blame for the accident upon the claimants, raised a question for the jury of Porter's contributory negligence. As matters eventuated on the trial, it made no difference because of the concurrent full recovery on the contract cause of action.

Accordingly, I dissent and vote to reverse and order a new trial.

Judges SCILEPPI and JASEN concur with Judge BERGAN; Chief Judge FULD concurs in an opinion; Judge BREITEL dissents in part and votes to reverse and grant a new trial in a separate opinion in which Judges BURKE and GIBSON concur.

Order reversed, etc.